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In the

Supreme Court of the United States

TAHOE SIERRA PRESERVATION COUNCIL, INC.,
a California nonprofit corporation and
membership organization, et al.,

Petitioners,

v.

TAHOE REGIONAL PLANNING AGENCY,
a separate legal entity created pursuant
to Bi-State Compact, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICI CURIAE OF PACIFIC LEGAL FOUNDATION AND CALIFORNIA ASSOCIATION OF REALTORS® IN SUPPORT OF PETITIONERS TAHOE-SIERRA PRESERVATION COUNCIL, ET AL.

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QUESTION PRESENTED

Whether the Court of Appeals properly determined that a temporary moratorium on land development does not constitute a taking of property requiring compensation under the Takings Clause of the United States Constitution?

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INTEREST OF AMICI CURIAE[1]

Since 1973, amicus Pacific Legal Foundation (PLF) has litigated in support of the constitutional rights of individuals to make reasonable use of their private property. PLF has participated as amicus curiae in nearly every Fifth Amendment takings case heard by this Court over that time, and PLF attorneys were counsel of record in three of them: *Palazzolo v. Rhode Island*, 121 S. Ct. 2448 (2001), *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997), and *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987).

PLF believes that its public policy perspective and litigation experience will provide an additional viewpoint that will assist the Court in its deliberations on the issues presented by this case. In the course of representing Mrs. Bernadine Suitum before this Court, and in supporting the present petitioners as amicus curiae in the courts below, PLF attorneys have gained unique insights into the plight of Tahoe-area residents who are subjected to the harsh and inflexible restrictions imposed by the Tahoe Regional Planning Agency (TRPA, respondent herein). Like Mrs. Suitum, many of the present petitioners have grown old while vainly striving to achieve their dream of building modest retirement homes on subdivided lots in fully or partially developed residential neighborhoods.[2] Tahoe residents have repeatedly pursued

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, amici curiae affirm that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

[2] Sadly but tellingly, some 55 of the original plaintiffs in this proceeding have died while waiting for TRPA to relax the

(continued...)

regulatory takings claims against TRPA to the United States Court of Appeals for the Ninth Circuit, only to have that court defer to TRPA's regulatory mission by invoking unique and creative jurisprudential theories to bypass the requirements of the Takings Clause. The present case is merely the latest example of this pattern, just as the "temporary moratorium" at issue here is merely one element in an interlocking web of land use prohibitions stretching back to TRPA's earliest days.

California Association of REALTORS® (CAR) is a nonprofit, voluntary, trade association incorporated in California whose members consist of local Boards and Associations of REALTORS®, and approximately 94,000 persons licensed as real estate brokers and salespersons by the state of California, as well as affiliate members such as real estate appraisers, title insurers, mortgage lenders, and real estate attorneys. Furthermore, CAR is actively engaged in promoting and establishing reasonable standards to govern the transfer of real estate and the protection of private property rights. CAR pursues its objectives through a variety of methods, including education of its members, creation of standard form agreements for use in real estate transactions, lobbying, providing legal advice to its members, and participation as amicus curiae in relevant court cases. Members of CAR assist the public in buying, selling, leasing, developing and managing residential, commercial and industrial real estate as well as mobile homes.

Unfortunately, due to the oftentimes misguided, or in some cases even hostile, actions that local governmental entities and courts have taken with regard to landowners' constitutional rights, CAR has been actively involved in land use and takings cases. CAR has participated previously as amicus curiae before

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[2] (...continued)
"temporary" restrictions that have deprived them of the beneficial use of their property for decades. *See* Petition for Writ of Certiorari at 3 n.4.

numerous courts including the seminal cases of *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987); and more recently in *Pennell v. San Jose*, 485 U.S. 1 (1988), and *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999).

The ruling by the Ninth Circuit Court of Appeals in this case makes it imperative that CAR once again participate as amicus curiae. The Ninth Circuit's flawed analysis and decision represents a fundamental misunderstanding and misapplication of this Court's well-established precedents.

STATEMENT OF THE CASE

In 1969, the Tahoe Regional Planning Agency was created by a bi-state compact to control development in the Lake Tahoe region of California and Nevada. Eleven years later, Congress amended the compact to strengthen TRPA's authority. Almost immediately, TRPA asserted its new powers by adopting Ordinance 81-5, the first in a series of moratoria prohibiting any beneficial use of much of the private property subject to the agency's jurisdiction. In one form or another, TRPA's "temporary" building prohibition has lasted for 20 years.

Ordinance 81-5 was quickly augmented by TRPA's Resolution 83-21, which suspended all permitting activities by the agency. Ostensibly to expire after 90 days, Resolution 83-21 was extended until a new regional plan was developed in April of 1984, 32 months after the adoption of the initial moratorium. For many of the region's residential property owners, including the petitioners in the present action, TRPA's formal lifting of the moratorium was of no practical consequence, since development of their properties was flatly forbidden by the 1984 plan. Although both the trial court below and the Ninth Circuit made much of the fact that the 1984 plan itself was promptly suspended by a court injunction, this made no difference to owners who had been deprived of all beneficial

use of their residential lots continuously since 1981, and were still forbidden to build on their land under the terms of the 1984 and subsequent regional plans.

The petitioners in this case are residential property owners in the Tahoe region who have been deprived of all economically viable use of their land by TRPA's development moratoria. In 1984, these owners filed an action asserting that TRPA's restrictions on the use of their lots amounted to a regulatory taking of their property for public use without just compensation. Over the next 15 years, this litigation resulted in 11 published opinions by the Federal District Courts of California and Nevada, the Ninth Circuit Court of Appeals, and this Court. Finally, in 1999, the surviving landowners accomplished their goal of obtaining an 11-day bench trial before the United States District Court for the District of Nevada. In that proceeding, the trial court determined, *as a factual matter*, that Ordinance 81-5 and Resolution 83-21 had deprived the petitioners of all economically viable use of their property, thereby triggering the constitutional requirement of just compensation. *See Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 34 F. Supp. 2d 1226, 1243-45 (D. Nev. 1999).

The Ninth Circuit Court of Appeals reversed. Although it did not disturb the factual finding that TRPA's moratoria had deprived petitioners of all economically viable use of their property, the appellate panel held that no compensation was required under the Takings Clause. *See Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 216 F.3d 764, 777 (9th Cir. 2000). Judge Reinhardt, writing for the unanimous panel, opined that the relevant property interests for purposes of Fifth Amendment takings analysis are "the whole parcels of property that [petitioners] own," *id.* at 779, and that these parcels should be defined to include the actual or potential use of the property "from the present to the future." *Id.* at 782. Under this reasoning, TRPA's denial of all use of

the petitioners' land affected only "finite temporal segments." *Id.* at 778. The agency's absolute prohibition of the use of these homesites for their intended purpose—a prohibition that has continued in effect for two decades—was seen as affecting only "a small fraction of the useful life of the Tahoe properties." *Id.* at 782. Compensation was not required under the Takings Clause because, as the Ninth Circuit reasoned, TRPA's development ban had not confiscated the entire "temporal dimension" of the petitioners' ownership interests. *Id.*

SUMMARY OF ARGUMENT

For 20 years, TRPA has deprived Tahoe property owners of all beneficial use of their land under a series of restrictive moratoria and regional plan provisions. The deprivations suffered by the present petitioners under Ordinance 81-5 and Resolution 83-21 are no different in incidence or effect than those effected under TRPA's 1984 regional plan, or the 1987 plan currently in effect. Isolating a single 32-month period out of the past two decades for evaluation as an independent, "temporary" violation of the petitioners' rights risks losing sight of the important context of TRPA's continuous prohibitions, of which this period of time was a small element. It is undisputed that the Takings Clause requires just compensation when regulations deprive owners of all economically viable use of their land. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992), and that

> "temporary" takings which, as here, deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation.

First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 318 (1987). Although carving out the 32-month period at issue here is essentially

arbitrary,[3] as TRPA's policy toward the petitioners during that period did not differ from its ongoing development ban, compensation for the fair value of petitioners' property over that time is mandated by *Lucas* and *First English*.

Over this same period of time, the Ninth Circuit Court of Appeals has repeatedly deferred to TRPA's unique construction of the Takings Clause of the Fifth Amendment. This Court has twice been called upon to reverse the Ninth Circuit on these issues and rule that TRPA is indeed subject to the constraints of the Takings Clause. This Court should use the present case as an opportunity to forthrightly address this issue, and deliver an unmistakable message to TRPA and the Ninth Circuit that no instrumentality of government is beyond the reach of the Constitution.

Finally, the decision below rests on the alleged need to avoid "conceptual severance" in regulatory takings claims. However, the notion of conceptual severance is a red herring that contributes nothing of substance to the evaluation of whether restrictive land use regulations have deprived an owner of all beneficial use of a recognized property interest protected by the Takings Clause. As the decision below exemplifies, virtually any real-world property interest can be "conceptually merged"[4] into some greater, more abstract conception of

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[3] The 32-month period currently at issue before this Court is merely a residual, petitioners' takings claims for the remainder of the 20 years having been defeated by the trial court's application of the statute of limitations, an erroneous ruling that a court order enjoining implementation of the 1984 regional plan somehow absolved TRPA of responsibility for depriving petitioners of the use of their land from 1984 through 1987, etc. *See Tahoe-Sierra*, 216 F.3d at 770-71.

[4] Whether the process is denoted as conceptual merger, "conceptual agglomeration" (*see* Steven J. Eagle, *Regulatory Takings* § 8-2(h) (1996)), or "conceptual composition," (*see* R. S. Radford, *Regulatory*
(continued...)

property for the purpose of concluding that the abstraction has not been taken. This is a sterile exercise that should be rejected in favor of a good-faith examination of the actual impact of TRPA's restrictive land use regulations on the actual property interests owned by the petitioners now before this Court.

ARGUMENT

I

THE MORATORIUM AT ISSUE IN THIS CASE IS ONLY ONE SMALL ELEMENT IN TRPA'S LONG HISTORY OF ABUSING THE RIGHTS OF TAHOE PROPERTY OWNERS WHILE EVADING THE CONSTITUTIONAL MANDATE OF JUST COMPENSATION

Lake Tahoe property owners have been attempting for two decades to obtain permission to build vacation or retirement homes on their land. Throughout that time TRPA has frustrated their efforts, while the Ninth Circuit Court of Appeals has consistently deferred to the agency's regulatory initiatives. As petitioners themselves capably argue, the moratorium at issue in this case, standing alone, is sufficiently onerous to trigger the requirement of just compensation under the Takings Clause. In a broader sense, however, this 32-month deprivation must be understood as merely one element—and indeed a relatively minor one—in TRPA's long-term strategy of banning all economically viable use of privately owned land within its jurisdiction, while evading the constitutional mandate of providing just compensation to the owners.

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[4] (...continued)
Takings Law in the 1990's: The Death of Rent Control?, 21 Sw. Univ. L. Rev. 1019, 1067 n. 284 (1992)), this relatively trivial intellectual exercise has the potential to eviscerate the protections of the Takings Clause in all cases short of the outright confiscation of title to the entirety of an individual's assets.

A. The "Temporary" 32-Month Development Freeze Under Ordinance 81-5 and Resolution 83-21 Was Part of an Ongoing Restrictive Scheme That Deprives Petitioners of All Beneficial Use of Their Property to This Day

Both the trial court and the Ninth Circuit in the proceedings below analyzed TRPA's Ordinance 81-5 and Resolution 83-21 as if these measures imposed an isolated, temporary, 32-month development ban on the petitioners' property. In fact, from the viewpoint of the landowners, this period was indistinguishable from any other time interval since TRPA began exercising its powers under the 1980 compact. The specific legislative rationale has changed from time to time, but TRPA has denied these individuals the right to make any beneficial use of their property continuously for the past 20 years.

As Professor Eagle has noted concerning this case:

> [T]here is no clear-cut distinction between a permanent prohibition and a temporary one. This is so both because of the possibility that one "temporary" regulatory barrier could be crafted after another, with no individual regulation being deemed a taking. The facts in *Tahoe-Sierra* well illustrate that point. More fundamentally, regulations now "permanent" may be fleeting and regulations now "temporary" may endure for generations.[5]

That TRPA's "temporary" moratorium has for all practical purposes endured indefinitely is confirmed by the experience of Bernadine Suitum, who was subjected to the same deprivations

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[5] Steven J. Eagle, *Temporary Regulatory Takings and Development Moratoria: The Murky View from Lake Tahoe*, 31 Env'tl L. Rep. 10224, 10227 (2001).

under TRPA's 1987 plan that the present petitioners suffered under Ordinance 81-5 and Resolution 83-21.

In 1989, when Mrs. Suitum applied for permission to build a small A-frame on her residential subdivision lot in Incline Village, Nevada, her parcel was one of the last remaining undeveloped lots in the subdivision. The property was bordered by existing homes on three sides, and on the fourth by a well-maintained paved street. A fire hydrant stands near one corner of the lot, and utility lines (including cable television service) pass overhead. Nevertheless, acting under authority of its 1987 Regional Plan, TRPA denied Mrs. Suitum's request to build a modest retirement home on her parcel. Indeed, the agency responded to her application by classifying her lot as lying within a "Stream Environment Zone" (SEZ)—a classification, shared by many of the present petitioners, on which "no new land coverage or other permanent land disturbance shall be permitted."[6] Her property was also declared unbuildable under TRPA's Individual Parcel Evaluation System (IPES). Faced with the irony of its declaring a single vacant lot in the middle of a busy, fully built out subdivision as too environmentally sensitive to allow the soil to be disturbed, TRPA was unfazed: according to the agency, the fact that Mrs. Suitum's lot was "surrounded by developed parcels and is serviced by a paved street and utilities is not part of the IPES scoring elements."[7]

TRPA's intransigence seemed especially odd in that its hard-line position applied solely to *private* development of the property. Under the same code that allowed TRPA's bureaucrats to deprive Mrs. Suitum of all use of her retirement

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[6] *See* 1987 Regional Plan for the Lake Tahoe Basin at iv-15; TRPA Code of Ordinances § 20.4.B.

[7] *Suitum v. Tahoe Regional Planning Agency*, Opposition to Defendant's Motion for Summary Judgment, Court Record (CR) 68, Exhibit 2 at 14.

homesite, *governmental* development of the same property would have been acceptable.[8] Nevertheless, with respect to private residential owners such as the present petitioners, it is clear that TRPA's position under the current 1987 plan is in no way less restrictive than it was 20 years ago, under Ordinance 81-5 and Resolution 83-21. The only difference is that today, owners of properties that TRPA brands "SEZ" are *allowed to apply* for permission to make some beneficial use of their land; however, there is no possibility that such permission will be granted.

Nine years ago, this Court laid down the categorical rule that the Takings Clause requires just compensation whenever regulations deprive owners of all economically viable use of their land. *Lucas v. South Carolina Coastal Council*, 505 U.S. at 1015. Five years before that this Court established that

> "temporary" takings which, as here, deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation.

First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. at 318. Although carving out the 32-month period at issue here is essentially arbitrary, as TRPA's policy toward the petitioners during that period did not differ from the ongoing development ban it has pursued down to the present day, compensation for the fair value of petitioners' property over the life of Ordinance 81-5 and Resolution 83-21 is mandated by *Lucas* and *First English*.

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[8] According to TRPA's regional plan, land in a SEZ will support no new *private* land coverage or permanent land disturbance whatsoever, but may be used for public recreation facilities or public service facilities. *See* 1987 Regional Plan for the Lake Tahoe Basin, at iv-25-26.

B. The Opinion of the Ninth Circuit Below Is Merely the Latest in a Line of Decisions in Which That Court Has Deferred to TRPA's Regulatory Mission, Effectively Insulating the Agency from Constitutional Constraints Under the Fifth Amendment

Residents and would-be residents of the Tahoe region have sought compensation from TRPA for the taking of their property since before the adoption of the 1980 compact. Unfortunately for these property owners, the United States Court of Appeals for the Ninth Circuit has repeatedly deferred to TRPA's regulatory mission by effectively insulating the agency from constitutional constraints under the Fifth Amendment.

The first inverse condemnation claim against TRPA to reach the Ninth Circuit was *Jacobson v. Tahoe Regional Planning Agency*, 566 F.2d 1353 (9th Cir. 1977). In that case, developable land that had previously been zoned as residential, multiple residential, and commercial was downzoned under TRPA's guidelines to "general forest," "recreation," and "conservation reserve." *Id.* at 1357-58. In that case, the court of appeals held that the Eleventh Amendment granted TRPA absolute immunity from liability under the Takings Clause; even though the agency's regulations might deprive Tahoe landowners of all productive use of their property, the owners had no recourse under the Fifth Amendment. *Id.* at 1360. This Court granted certiorari and reversed the Ninth Circuit, thereby establishing a pattern that continues to this day. *See Lake Country Estates v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979).

On remand from this Court, the United States District Court for the District of Nevada ruled that, even though Eleventh Amendment immunity did not pertain, applying the Takings Clause to TRPA would nevertheless be "inappropriate" because, *inter alia*, the agency lacked formal condemnation

authority. *See Jacobson v. Tahoe Regional Planning Agency*, 474 F. Supp. 901, 903 (D. Nev. 1979).[9] This ruling was affirmed without opinion by the Ninth Circuit, *see Jacobson v. Tahoe Regional Planning Agency*, 661 F.2d 940 (9th Cir. 1981).

Comparable judicial deference to TRPA's mission was displayed when an earlier incarnation of the present litigation reached the Ninth Circuit more than a decade ago. *See Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 911 F.2d 1331 (9th Cir. 1990). On that occasion, the appellate court coined a new "ripeness" requirement for regulatory takings claims—holding that property owners whose land has been stripped of all beneficial use are required to *seek an amendment to the offending agency's general plan* prior to filing suit for inverse condemnation. *See id.* at 1336-39. This was a completely unprecedented requirement—forcing citizens to engage in political lobbying as a condition precedent to being allowed to exercise their First Amendment right to petition the government in court. In the words of one commentator:

> In conjunction with the already burdensome requirements of finality and exhaustion of state compensation procedures, this new requirement would have transformed the Fifth Amendment's just compensation mandate into a theoretical pipe dream for private property owners.[10]

[9] The district court also held that the landowners could not maintain a suit for damages against TRPA for violation of their civil rights under 42 U.S.C. § 1983 on the circular reasoning that if compensation were not available for TRPA's "confiscatory" regulations under the Takings Clause, injured property owners should not be allowed to sue for damages for the agency's violation of their due process rights. 474 F. Supp. at 904.

This rule has only been applied by the Ninth Circuit to takings claims asserted by those property owners against TRPA and has not been imposed on any other litigants, before or since. *See Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 938 F.2d 153, 157 (9th Cir. 1991).

A further example of deference to TRPA can be found in *Suitum v. Tahoe Regional Planning Agency*, 80 F.3d 359 (9th Cir.), *cert. granted*, 519 U.S. 926 (1996), *vacated*, 123 F.3d 1322 (1997). There, the Ninth Circuit ruled that, although TRPA had deprived an elderly widow of all beneficial use of her retirement homesite, the landowner could not state a regulatory taking claim until she canvassed the region in an attempt to find buyers for three types of administrative credits which the agency had created. *Id.*, 80 F.3d at 362-63. Once again, this Court granted certiorari and reversed the Ninth Circuit. *See Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997). As Chief Justice Rehnquist commented at oral argument, the Ninth Circuit had denied Mrs. Suitum the right to pursue her constitutional remedy against TRPA based on an argument that essentially reduced to:

> TRPA says you can't use your lot but here's some scrip, you go over to Harrah's and you can play roulette with it.[11]

[10] Timothy V. Kassouni, *The Ripeness Doctrine and the Judicial Relegation of Constitutionally Protected Property Rights*, 29 Cal. W. L. Rev. 1, 33 (1992).

[11] *Suitum v. Tahoe Regional Planning Agency*, No. 96-243, Transcript of Oral Argument, 1997 U.S. TRANS LEXIS 22, 26.

Unfortunately, it appears that no matter how often this Court rebuffs TRPA's attempts to take private property for public use without paying any compensation, the Ninth Circuit continues to defer to TRPA's unique construction of the Fifth Amendment. This Court should use the present case as an opportunity to forthrightly address this issue, and deliver an unmistakable message to TRPA and the Ninth Circuit that no instrumentality of government is beyond the reach of the Constitution.

II

"CONCEPTUAL SEVERANCE" IS AN EMPTY CONSTRUCT THAT CONTRIBUTES NOTHING TO A MEANINGFUL JURISPRUDENCE OF REGULATORY TAKINGS

Judge Reinhardt's opinion for the Ninth Circuit was expressly based on the supposed need to avoid "conceptual severance" in takings claims:

> Property interests may have many different dimensions. For example, the dimensions of a property interest may include a physical dimension (which describes the size and shape of the property in question), a functional dimension (which describes the extent to which an owner may use or dispose of the property in question), and a temporal dimension (which describes the duration of the property interest). At base, the plaintiffs' argument is that we should ***conceptually sever*** each plaintiff's fee interest into discrete segments in at least one of these dimensions - the temporal one - and treat each of those segments as separate and distinct property interests for purposes of takings analysis. Under this

> theory, they argue that there was a categorical taking of one of those temporal segments.[12]

"Conceptual severance" is a term that was introduced into legal parlance by Professor Radin in a law review article published 13 years ago:

> [Conceptual severance] consists of delineating a property interest consisting of just what the government action has removed from the owner, and then asserting that that particular whole thing has been permanently taken. Thus, this strategy hypothetically or conceptually "severs " from the whole bundle of rights just those strands that are interfered with by the regulation, and then hypothetically or conceptually construes those strands in the aggregate as a separate whole thing.[13]

In other words, Professor Radin decries what she perceives as the tendency of property owners to seek compensation under the Takings Clause when government action or regulation has deprived them of discrete, identifiable property interests that constitute less than the totality of their holdings. This theme was embellished by Judge Reinhardt in the opinion below, in finding that TRPA was not liable for a taking because the landowners (or their descendants) would retain most of the

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[12] *Tahoe-Sierra*, 216 F.3d at 774 (emphasis added).

[13] Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 Colum. L. Rev. 1667, 1674-78 (1988), *cited in* opinion below, 216 F.3d at 776. Although the term originated with Radin, the concept itself traces back to Michelman: "It might . . . appear that the scope of the 'thing' subject to devaluation is to be defined by the incidence of the measure itself." Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165, 1193 (1967).

"useful life" of their land after the agency had finished prohibiting them from putting it to any beneficial use.[14] However, this was not the only way the court below could have employed the "conceptual severance" paradigm to arrive at the same outcome.

In a more recent article than the one relied upon by the court below, Professor Coletta has pointed out that there is yet another "dimension" to property:

> In the *vertical dimension*, the relevant parcel is viewed columnally from the depths of the earth to the heights of the sky.[15]

Viewed in this way, it seems highly dubious that a property owner should be allowed to claim a Takings Clause violation simply because land use regulations have deprived him of all beneficial use of that tiny sliver of his property that happens to coincide with the surface of the earth.[16] Thus, just as the "temporal" dimension of property can be conceptually extended until any taking for a span of years can be portrayed as de minimus, so we can conceptually enlarge holdings "vertically" until any taking of the surface estate can be portrayed as a negligible intrusion.

Regardless of the particular model we choose to employ, analysis of "conceptual severance" rests on a logical sleight-of-hand. Behind Professor Radin's reasonable-sounding reference to property interests consisting of less than "the whole bundle"

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[14] 216 F.3d at 782.

[15] Raymond R. Coletta, *The Measuring Stick of Regulatory Takings: A Biological and Cultural Analysis*, 1 U. Pa. J. Const. L. 20, 36 (1998).

[16] *See id.* at 43-44.

lurks an unspoken premise that there is some objectively *complete* "bundle" of rights--which, not coincidentally, always consists of more than what has been taken in any particular case.

In the decision below, the Ninth Circuit found that compensation was not required because a 32-month deprivation of all use was but "a small fraction of the useful life of the Tahoe properties."[17] But exactly the same statement would apply to a 32-*year* "slice" of the properties' temporal dimension. Indeed, a moratorium lasting for 32 *centuries* would deprive the Tahoe property owners of less than .0001% of the expected remaining useful life of their properties, according to the best available scientific estimates.[18]

Taken together, Judge Reinhardt's and Professor Coletta's models make an important point: at the conceptual level, property is a completely abstract concept, without temporal or spatial limits. Property only acquires its utilitarian function when human beings apply their intellects to the task of cutting, trimming, and defining specific interests and estates out of that primordial abstraction. Thus, the question is not whether we should engage in conceptual severance; *we always do!* The existence of identifiable, usable, exchangeable property interests in the real world is entirely the result of man's ingenuity in conceptually carving those interests out of the initial abstraction of property without temporal or spatial boundaries. The relevant question, in every takings case, is not whether the property interest at issue arose through conceptual severance—*it invariably did*—but whether that particular

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[17] 216 F.3d at 782.

[18] *See, e.g., American Frozen Food Institute v. Train*, 539 F.2d 107, 113 (D.C. Cir. 1976) (noting in dicta that conditions for sustaining life on earth "are likely to be enjoyed for another four or five billion years").

interest is one that is recognized and protected under the Fifth Amendment.

The answer to this question will vary on a case by case basis, and the notion of conceptual severance adds nothing to the analysis. Both this Court and the lower federal and state courts have routinely found regulatory takings of specific spatial, functional, and temporal property interests that could easily have been—but were not—folded into more extensive conceptions of property. Specific, severable interests that have been recognized as protected by the Takings Clause include flowage easements,[19] contractual commitments,[20] liens against real estate[21] and vessels,[22] the right to exclude third parties[23] and the general public,[24] and the right to devise property to one's heirs.[25]

These examples illustrate the long-recognized phenomenon of "unbundling" property interests for purposes

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[19] *United States v. Virginia Electric and Power Co.*, 365 U.S. 624 (1961).

[20] *Lynch v. United States*, 292 U.S. 571 (1934).

[21] *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935).

[22] *Armstrong v. United States*, 364 U.S. 40 (1960).

[23] *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

[24] *Kaiser Aetna v. United States*, 444 U.S. 164 (1979).

[25] *Hodel v. Irving*, 481 U.S. 704 (1987).

of applying the protections of the Takings Clause.[26] In all these cases, the relevant question has been perceived to be not whether the courts can conceive of some more inclusive property interest that has *not* been taken, but whether the interest that *has* in fact been taken qualifies for protection under the Fifth Amendment. As has been noted by the Federal Circuit Court of Appeals:

> Nothing in the language of the Fifth Amendment compels a court to find a taking *only* when the Government divests the total ownership of the property.[27]

This Court should similarly recognize that the notion of "conceptual severance" is a red herring. As Judge Reinhardt and Professor Coletta have shown, it is *always* possible to fold any given property interest into some broader conception of property, for the purpose of concluding that the broader conception has not been taken. But this cannot be the basis of a serious Fifth Amendment jurisprudence.

If a local ordinance prohibits a newspaper from publishing criticisms of elected officials, no one could seriously argue that the First Amendment was not violated because the paper remains free to print all manner of other material. Only one "tiny slice" of the conceivable spectrum of communication has been foreclosed, yet that would certainly be sufficient to trigger the protections of the First Amendment.

Similarly, a crime-fighting initiative that authorized random, warrantless searches of private homes between the

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[26] *See* Craig A. Peterson, *Recent Development in "Takings" Jurisprudence: Land Use Regulatory "Takings" Revisited: The New Supreme Court Approaches*, 39 Hastings L.J. 335, 357 (1988).

[27] *Florida Rock Indus., Inc. v. United States*, 18 F.3d 1560, 1568-69 (Fed. Cir. 1994).

hours of 4:00 and 5:00 a.m. could not withstand attack under the Fourth Amendment on the grounds that no such intrusions are authorized during the remaining 23 hours of each day. Even though it could be shown that there are *an infinite number* of points of time during which citizens subject to this ordinance would *not* be subjected to arbitrary searches, the protection of the Bill of Rights would clearly foreclose the searches conducted during the single hour.

In each of the above examples, it is simply irrelevant to inquire what freedoms *remain* under the ordinances; the Constitution is concerned with the freedoms that have been *abridged*. As this Court has observed:

> We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation in these comparable circumstances.[28]

While the useful life of the Tahoe properties may extend well beyond TRPA's planning moratorium, the lives of the individual property owners represent much smaller slices of the "temporal whole." The surviving residential property owners who are now before this Court should not be denied compensation for the 20 years they have been denied the right to make use of their property merely because their land will endure far beyond their own lifetimes.

CONCLUSION

For the reasons stated above, amici Pacific Legal Foundation and California Association of REALTORS® respectfully request this Court to reverse the decision below and

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[28] *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994).

instruct the court of appeals to remand this matter to the federal district court for a determination of just compensation.

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Respectfully submitted,

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